

The Patriot Act Should Be Amended to Respect Fourth Amendment Rights

Domestic Wiretapping, 2008

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On December 31, [2005,] sixteen portions of the USA Patriot Act are set to expire—or in legal parlance, "sunset." Currently, Congress is holding hearings on the Act. It is considering, among other issues, whether to amend it to curb the broad surveillance powers the Act bestowed on the federal government.

For example, under the Act, the government can now monitor an individual's web surfing records. It can use roving wiretaps to monitor phone calls made by individuals "proximate" to the primary person being tapped. It can access Internet Service Provider records. And it can even monitor the private records of people involved in legitimate protests.

After September 11, 2001, when the Act was passed, the Executive argued that these broader powers would be used to put terrorists behind bars. In fact, several of the Act's provisions can be used to gain information about Americans in the context of investigations *with no demonstrated link to terrorism*.

For this reason, I will argue, the Act should be amended. The USA Patriot Act as a whole includes important powers. But as written, the Act goes far beyond its justification: terrorism prevention.

In this column, I will focus on just a few of the Act's sunset provisions—each of which, in my view, should be repealed or, at a minimum, allowed to expire [in] December [2005]....

The Burden of Proof

Before I consider these sunset sections of the Act, I will first consider what burden of proof should apply, and what information is available to help us evaluate the Act's use.

In its final report, the 9/11 Commission recommended that President Bush should bear the burden of proof to show that Congress ought to renew the Act provisions that are subject to "sunset" limitations. Specifically, the Commission recommended that the provisions be allowed to sunset unless the President can show that each power actually materially enhances security, and that there is adequate supervision of the use of such powers to ensure that civil liberties are protected.

In many cases, based on the information that has so far been made public, it is clear that such a showing cannot be made. Moreover, the Executive Branch should make more information public

before Congress decides.

The FBI and the Department of Homeland Security have provided anecdotal information about the law's use, but some politicians have rightfully grown frustrated with the lack of detailed information.

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For instance, Senator Jon Kyl (AZ-R) has released a file indicating that requests to the Justice Department "to provide a comprehensive report" on the "provisions of the Patriot Act subject to 'sunset' remain unfulfilled." However, as Kyl's file adds, "Such a report is a critical element in [Congress'] responsibility to provide meaningful oversight before determining whether to change the law with respect to these provisions."

The Department of Justice should provide Congress with full accountings of how the government has used its newfound authority under the Patriot Act. But as I will explain, even the information we have so far provides reason enough to cause Congress to either allow these sections to "sunset," or, at a minimum, significantly amend them.

Pre-Patriot Act Surveillance Regime Respected Fourth Amendment Rights

Our legal system has long separated foreign-intelligence-gathering from domestic criminal enforcement. But under the USA Patriot Act, the distinction is significantly blurred.

Before discussing that blurring, though, it's worth noting how clear the distinction was *before* the USA Patriot Act was enacted into law. At that time, the law struck a fine constitutional balance when it came to electronic surveillance. Since then, that balance has been destroyed.

In 1978, the FISA (Foreign Intelligence Surveillance Act) established a court—known as the FISA Court—with power to issue secret warrants. The purpose of these warrants was to aid in intelligence-gathering, with a view toward preventing espionage and terrorism.

The result [of the Patriot Act] is to open the door to an end run around Americans' Fourth Amendment rights.

Thus, the statute made clear that "the purpose" of FISA-warrant-authorized surveillance would be solely to gather foreign intelligence. And to procure such a warrant, the government had to convince the FISA court there was "probable cause" that the surveillance target was a foreign power or an agent of a foreign power.

The contrast between this standard, and the standard applicable in federal domestic criminal cases was stark. Under the Fourth Amendment, in federal domestic criminal cases, a warrant to intercept a communication or a search warrant must be based on "probable cause" *to believe that a crime has been or is being committed*. If a prosecutor could convince a federal judge that such probable cause

existed, a warrant would be issued in a domestic federal criminal case.

The contrast between FISA surveillance and surveillance in regular criminal investigations is stark too. First, there is the secrecy: The targets of FISA surveillance are never notified that they were spied on. In contrast, a domestic criminal defendant gets a copy of the warrant so that he can challenge its legality under the Fourth Amendment, contending that because "probable cause" was lacking, the fruit of the search should not be admitted as evidence in federal court.

Second, there is the lack of clear precedent. The FISA court does not publish its decisions and procedures, as other federal courts do. So unlike in other federal courts, in the FISA court, there is no way for defendants and their attorneys to know how the court interprets the legal standards it applies. Nor is there a way for them to argue that the courts is departing from its own, or a higher court's, binding precedents—an important litigation tactic for federal criminal defense attorneys.

Third, and finally, there is the lack of recourse. There is no clear way to challenge FISA-authorized surveillance—the court doesn't even have a public address. In contrast, federal criminal defendants, again, may move to suppress the evidence that results from a warrant that is not supported by "probable cause."

The Patriot Act Should Be Amended

The USA Patriot Act blurred the key contrasts between foreign-intelligence-gathering and domestic law enforcement. Now, intelligence-gathering need *not* be the sole purpose of FISA-warrant-authorized surveillance.

Instead, as a result of Section 218 of the PATRIOT Act, intelligence gathering need only be "a significant purpose" of FISA-authorized surveillance.

The result has been that not just CIA agents, but FBI agents as well—or even state police, cooperating with the CIA and FBI—have the ability to utilize FISA's secrecy and lower legal standards. No longer must they prove "probable cause" that a crime has been, or is being, committed—as the Fourth Amendment requires. Instead, all they have to prove is that foreign intelligence is a "significant" purpose of the surveillance. Another purpose can be domestic law enforcement....

The result is to open the door to an end run around Americans' Fourth Amendment rights. Unable even to see the basis for the secret FISA warrant that authorized a search of their home or business, Americans may not be able to challenge that warrant in a criminal proceeding.

Given that FISA warrants allow federal agents to avoid Fourth Amendment challenges, it's no surprise that they are being used more and more frequently. Indeed, some data indicates that there is now more surveillance being authorized by the FISA court, than by all the other federal courts, in the fifty states, combined.

Clearly, the new "significant purpose" standard is problematic. Granted, there may be some circumstances in which domestic criminal investigations are genuinely connected to foreign intelligence, so that the "sole purpose" standard is too limiting for law enforcement.

For instance, suppose that an investigation focused on surveillance of spies also uncovers a domestic plot by Americans to forge pilot's licenses in service of domestic terrorism—in a sort of September-11-meets-Oklahoma-City scenario. In that kind of situation, it could be appropriate for a FISA warrant to cover the whole investigation, even though "foreign intelligence" was not its sole purpose.

But these situations are few and far between. Even if the "sole purpose" standard is not reinstated, the "significant purpose" standard should be clearly limited by the requirement of a nexus to terrorism on the domestic side. The FISA Review Court, in a historic first decision, previously stated that "the FISA process cannot be used as a device to investigate *wholly unrelated* ordinary crimes." As I asked before, however, what about loosely related ordinary crimes? Will law enforcement be able to bypass the Fourth Amendment when it comes to them, too?

Also, it might be possible that for terroristic crimes, even those with no connection to foreign intelligence, Fourth Amendment standards should be different. But that is a question for the courts, not for Congress, to answer.

Further Readings

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